

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast Service)

MM Docket No. 87-268

To: The Commission

**PETITION FOR RECONSIDERATION AND
EMERGENCY REQUEST FOR CLARIFICATION**

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SUMMARY

The Commission's adoption of an interim 200 kW power limit on DTV operation violated the Administrative Procedure Act because parties were not given notice of the 200 kW cap or an opportunity to comment on it. Fox affiliates will be uniquely disadvantaged by the cap. On the one hand, Fox affiliates need to maximize to compete with other networks, which have DTV service areas that replicate their large VHF NTSC service areas. On the other hand, Fox cannot wait until late in the DTV transition period -- when the 200 kW cap is lifted -- to construct its facilities in the top 30 markets, where the FCC has required accelerated construction for the top four networks.

The early construction obligations in the top 30 markets will force Fox affiliates, in effect, to construct twice. To meet the deadlines, they will have to construct at power levels below 200 kW. When the power cap is lifted at some point during the DTV rollout, Fox will have to decide whether to apply for a power increase -- which requires substantially different equipment -- or to continue operating with power levels that give them inferior coverage vis-a-vis their competitors.

The Commission should permit any station that wishes to maximize to do so at the outset, subject to safeguards that will protect *bona fide* applicants from those who only wish to obstruct their competitors.

BEFORE THE

In the Matter of

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To:

PETITION FOR RECONSIDERATION AND

Fox Broadcasting Company ("Fox"), by its attorneys and pursuant to

Section 1.429 of the Commission's rules, hereby petitions for limited reconsideration,

and seeks clarification on an emergency basis, of the *Memorandum Opinion and Order*

on Reconsideration of the Sixth Report and Order in the captioned proceeding (the

"Sixth Order on Reconsideration"). 1/ As part of the Sixth Order on Reconsideration the

Commission reduced the maximum power for UHF stations from one megawatt to 200

kilowatts on an interim basis (except that stations may use beam tilting techniques to

increase power above 200 kW in their service areas). 2/ The 200 kW limit will

undermine the Commission's goal of rapid deployment of DTV technology to the largest

number of consumers and will penalize those UHF stations that are required (or are

1/ FCC 98-24 (Feb. 23, 1998). Fox is the parent company of Fox Television

Stations, Inc., which owns television stations, and Fox Network, Inc., which supplies

Fox network programming to stations owned by Fox Television Stations, Inc. and other, unaffiliated stations.

2/ *Sixth Order on Reconsideration at n.56.*

volunteering) to construct early in the DTV process. To maximize the availability of off-air DTV to the public, and thereby promote penetration of DTV consumer reception equipment, the Commission should reaffirm its earlier decision to permit UHF DTV applicants to maximize up to one megawatt. 3/

The adoption of a 200 kW power limit was not proposed as an alternative in the *Sixth Report and Order and Further Notice of Proposed Rulemaking 4/*, nor did any of the parties who sought reconsideration of the *Sixth Report and Order* address it. Thus, neither Fox -- nor any other party -- had an opportunity to comment on the imposition of the 200 kW power limit on UHF DTV operations prior to its implementation. The impact of this power limitation on Fox and its affiliates poses a unique hardship, and its detrimental effect is exacerbated by the fact that Fox's largely VHF competitors already enjoy substantial coverage advantages over Fox affiliates.

To avoid the gross inefficiency and inequity of the arbitrary interim 200 kW cap, Fox requests that the Commission quickly clarify that it will entertain UHF maximization applications, so long as the applications proposing maximization at power levels above 200 kW demonstrate that interference to other stations will meet the *de minimus* standards set forth in the *Sixth Order on Reconsideration*. In addition, Fox suggests guidelines below that will ensure that all *bona fide* UHF applicants who wish to maximize power will have the same opportunity to do so.

3/ The Commission's failure to define the period of time during which UHF stations must observe the 200 kW power limit is also problematic, injecting another unknown variable into the already speculative realm of DTV.

4/ FCC 97-115 (April 21, 1997).

I. The 200 kW Limit on UHF DTV Power Was Adopted in Violation of the Administrative Procedure Act and the Commission's Rules Because Interested Parties Had No Opportunity to Comment.

The Commission did not provide any notice whatsoever that it was considering the imposition of an interim 200 kW cap on UHF power levels. ^{5/} The *Sixth Report and Order* clearly established a one megawatt power limit for UHF stations: ". . . it is appropriate to develop the DTV Table based on a minimum power level of 50 kW and a maximum power level of 1000 kW." ^{6/} There was no indication in the *Sixth Report and Order* that this provision would be subject to further consideration, or that its implementation might be delayed. Furthermore, the one megawatt power limit was not questioned, challenged or even raised by any of the 239 petitioners for reconsideration of the *Sixth Report and Order*. Given the volume of issues raised on reconsideration in this proceeding, it is perplexing that the Commission would decide to revisit an issue that was already resolved and that no party had challenged.

Under the Administrative Procedure Act, agencies are required to provide the public with "either the terms or the substance of a proposed rule or a description of the proposed subject and issues involved." See 5 U.S.C. § 553(b)(3). Courts have clarified that, while this principle does not require an agency to give notice of "every

^{5/} Although the Commission has not codified this power cap in its "rules", the cap's existence as a processing guideline has the same effect on parties as would an official rule. Thus, the procedural safeguards set forth in the Administrative Procedure Act are offended by the Commission's failure to provide for notice and comment on the cap.

^{6/} *Sixth Report and Order* at ¶ 30.

precise proposal which it may ultimately adopt as a rule,” 7/ it does require that the final rule be a “logical outgrowth” of the proposed rule. 8/ The 200 kW cap, reducing by 80 percent the potential power level for UHF DTV stations, cannot be said to have been a “logical outgrowth” of the *Sixth Report and Order*.

Nor does the language in the *Sixth Order on Reconsideration* shed any light on what prompted the reconsideration of the maximum UHF power level. The *Sixth Order on Reconsideration* merely states, without elaboration or explanation,

To ensure that parties have a fair opportunity to take advantage of our new *de minimus* [interference] approach, we initially are limiting maximization requests for increased power by UHF DTV stations to 200 kW. We therefore will not accept requests by UHF DTV licensees to increase their service area through a maximization of power above 200 kW until substantial progress has been made in the rollout of DTV service. *Sixth Order on Reconsideration* at ¶ 81 (footnote omitted).

There is no explanation why parties will be unable to take advantage of the new *de minimus* approach if applications proposing maximized facilities are accepted from the outset. Indeed, satisfaction of the Commission’s *de minimus* interference requirements would be a prerequisite to grant of any such an application.

The adoption of the 200 kW UHF DTV power cap raises major issues. First, it undermines the Commission’s stated goal of speedy rollout of DTV. Second, Fox affiliates will be uniquely disadvantaged by the combination of early DTV build-out requirements and the 200 kW power limitation, due to the large number of Fox-affiliated UHF outlets in the top 30 markets. And yet, because there was no opportunity for Fox

7/ *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967).

8/ *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

to comment on the 200 kW proposal, the Commission may not have been aware of this unfair result when imposed the processing guideline. Given the impact of the cap on the ability of viewers to quickly receive DTV, the procedural deficiencies in the promulgation of the 200 kW power limitation, and the unfair disadvantage the cap imposes on Fox affiliates vis a vis their competitors, Fox urges the Commission to reconsider and eliminate the 200 kW limit.

II. The 200 kW Limit Will Delay The Rollout of DTV

The Commission repeatedly has emphasized the importance of speedy implementation of DTV. Its reasons for favoring a rapid rollout of DTV reveal that the speed of the rollout is indeed a critical policy issue. One reason cited by the Commission in favor of a rapid implementation schedule is that "digital broadcast television stands a risk of failing unless it is rolled out quickly." 9/ Second, the Commission predicted that "a rapid construction period will promote DTV's competitive strength internationally, as well as domestically." 10/ Third, "an aggressive construction schedule helps to offset possible disincentives that any individual broadcaster may have to begin digital transmissions quickly, as well as the possible absence of market forces that might themselves ensure rapid construction." 11/ Finally, the Commission also noted that "a rapid build-out works to ensure that recovery of broadcast spectrum occurs as quickly as possible." 12/

9/ *Fifth Report and Order* at ¶ 80.

10/ *Id.* at ¶ 81.

11/ *Id.* at ¶ 82.

12/ *Id.* at ¶ 83.

Adoption of the 200 kW cap is at odds with the Commission's fundamental policy favoring -- indeed, mandating -- rapid DTV implementation. The 200 kW power limit will mean that stations' initial DTV service areas are smaller than they would be if stations were permitted where possible at the outset to maximize up to one megawatt. Fewer consumers will be able to receive DTV in the early years of the rollout under this smaller-service-area scenario. Consumers, in turn, are unlikely to buy new digital television sets until DTV is widely available. Thus, the ultimate speed of the transition, and the quick return of the analog spectrum, will be affected by the 200 kW cap. This major deviation from the policy of promoting early DTV availability to consumers is not warranted.

Indeed, the 200 kW cap could operate as a reverse incentive to a rapid build-out. If, as explained in greater detail in Section III, *supra*, UHF stations would be required to undertake a costly two-stage build-out in order to fully maximize, some stations will undoubtedly wait as long as possible to begin construction. For networks like Fox that are planning a rapid DTV build-out, in many cases ahead of schedule, this disincentive comes at a critical time in the deployment of DTV.

III. The 200 kW Cap Will Affect the Ability of Pioneer DTV Stations to Compete With Their Stronger VHF NTSC Competitors

Without the opportunity for Fox stations to maximize above the 200 kW power level, the Commission has guaranteed that the NTSC disparity in coverage areas between UHF Fox affiliates and other networks' VHF affiliates will continue in the DTV model. Fox's largely UHF affiliates will be uniquely disadvantaged by the 200 kW power limit in the top 30 markets because their smaller coverage areas will be frozen

by the 200 kW cap. Meanwhile, Fox's largely VHF competitors will continue to enjoy superior coverage due to the Commission's decision to create DTV service areas that replicate NTSC service areas. This inequity can only be cured by eliminating the 200 kW power cap.

The Commission indicated in the *Sixth Order on Reconsideration* that the 200 kW power limit will be lifted at such time as "substantial progress has been made in the rollout of DTV service." ^{13/} The possibility of increasing stations' service areas by waiting until the FCC lifts the 200 kW limit will provide a strong incentive for UHF stations to wait until late in the DTV transition period to construct their stations, anticipating the FCC's eventual elimination of the 200 kW power limit. By delaying their DTV construction, these stations would be able to submit just one construction permit application for one facility, and to avoid the potential problem of having to purchase two completely different sets of equipment to accommodate different power levels.

Fox affiliates, however, do not have the option to wait until late in the DTV transition period in the top 30 television markets, where FCC rules impose an accelerated DTV build-out schedule on network affiliates. ^{14/} Network stations in the top 10 markets are required to complete DTV construction by May 1, 1999 and network affiliates in the top 30 markets must complete DTV construction by November 1, 1999. The other three networks subject to these requirements are affected only minimally by

^{13/} *Sixth Order on Reconsideration* at ¶ 81.

^{14/} *Fifth Report and Order*, FCC 97-116 (¶ 76) (April 21, 1997).

the 200 kW cap because the overwhelming majority of their NTSC affiliates in the top 30 markets are VHF stations. Thus, they already have substantial coverage advantages over Fox affiliates. More specifically, ABC and CBS each has three UHF affiliates in the top 30 markets and NBC has four UHF affiliates in the top 30 markets. Fox has 16 UHF affiliates in the top 30 markets. Because Fox affiliates are subject to the early build-out requirements and because Fox affiliates are primarily -- and uniquely -- UHF stations, Fox alone will be whipsawed by the FCC's aggressive DTV construction schedule on the one hand and its serious limitations with respect to initial DTV power levels, on the other.

If UHF stations are not permitted to submit proposals to maximize facilities up to one megawatt until later in the DTV transition period, affected Fox affiliates may be forced to construct twice. To meet the accelerated build-out schedule in the top 30 markets, Fox affiliates will have to complete facilities with power levels not over 200 kW. Then, at some unspecified time down the road, when the Commission lifts the 200 kW power limit, Fox affiliates will have to submit new construction permit applications for power levels above 200 kW. When these applications are granted, Fox affiliates will have to replace their new 200 kW DTV transmitters, antennae and transmission lines to accommodate the higher power levels. The inefficiency and costs of constructing the same DTV station twice are staggering. Moreover, the vagueness of this timeline adds yet another element of uncertainty for stations trying to establish business plans for the DTV transition.

While the basic elements of a 200 kW DTV facility are less costly than the same elements for a one megawatt facility, the costs for a 200 kW operation nevertheless are substantial. ^{15/} A solid state transmitter for a 200 kW DTV facility will cost approximately \$750,000. A six-inch coaxial transmission line for the 200 kW facility will cost approximately \$200,000. The antenna will cost approximately \$250,000. The useful life of this equipment is 15 to 20 years. Much of this equipment would not be suitable to deliver a one megawatt signal. Therefore, Fox affiliates that are required to build UHF facilities under the 200 kW temporary power limitation may find themselves over \$1 million in obsolete -- but practically new -- DTV equipment when the Commission lifts the power cap at some point during the DTV rollout.

In addition, a "double" buildout will further strain the already limited capacities of digital equipment manufacturers and tower construction companies, causing a domino-effect delay in the digital build-out.

It would be possible in some cases for UHF stations to avoid completely rebuilding the DTV facilities by installing higher-rated equipment in the first place. This costly plan would require stations to construct transmission facilities for their initial operation at less than 200 kW that could be used to operate facilities with up to one megawatt of power. Investment in the much more costly equipment would be based entirely on the assumption that the Commission eventually will lift the 200 kW cap. This approach is not attractive, given the enormous cost differential between equipment

^{15/} The figures provided are estimates only and can be expected to be higher or lower, depending upon a number of factors, including among others, the buying power of the broadcaster and geographic location of the station, and local zoning restrictions.

for a 200 kW facility and a one megawatt facility. A one megawatt facility could not use the solid state transmitter available for the 200 kW operation at \$750,000. Instead, to achieve one megawatt of power, a 3- or 4-tube transmitter is required at a cost of \$900,000 to \$1.2 million. Likewise, coaxial transmission line may be unusable to deliver one megawatt of power. If a waveguide transmission line were used, not only would it increase the cost of the transmission line substantially, but the waveguide's larger size causes substantially more wind-loading than the coaxial line. In a worst-case scenario, the additional wind-loading could require construction of a new tower to accommodate the transmission line. Stations understandably will be reluctant to invest in much more expensive high-power equipment in reliance on the mere possibility that they may be permitted to apply for higher power at some point in the future.

Much earlier in the DTV rulemaking process, the Commission expressed concern that uncertainties in its rules could cause reluctance on the part of broadcasters to invest in equipment that may become obsolete. 16/ And yet here, under these new processing guidelines, the Commission will virtually force UHF Fox affiliates in 16 of the top 30 markets to invest in equipment that will become obsolete at such time as the FCC permits stations to increase their service areas by increasing power above 200 kW. The impact of this gross inefficiency on Fox is magnified by its competitors' ability to construct DTV facilities at full power immediately.

16/ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 FCC Rcd 17771 (¶ 35) (Dec. 27, 1996).

IV. The Commission Should Not Delay Acceptance of Maximization Applications Up to One Megawatt in Power for Any *Bona Fide* UHF Applicant

Any station that can meet the *de minimus* interference criteria should be permitted to maximize power up to one megawatt immediately. This will benefit those consumers who will sooner receive new off-air DTV service sooner because of the expanded service areas. Any UHF station should have the opportunity to submit an application to maximize its service area by increasing power above 200 kW, beginning immediately. To be sure, some applicants will choose to wait until later in the process to submit their applications. But that will be their choice. Those stations that choose to propose operation at higher than 200 kW now should be free to do so. The choice should be based on informed decision making by the stations, not regulatory restrictions.

All maximization applications will have to demonstrate compliance with the *de minimus* interference standards already adopted by the Commission. This important safeguard will protect any stations electing to defer construction until later in the DTV transition period.

There is a foreseeable danger in permitting maximization applications at this time is that stations could file maximization applications merely to thwart competitors, even if they have no true intention of constructing maximized facilities. But this danger can be averted if the Commission adopts safeguards to ensure the *bona fides* of applications for maximization. All applicants should be required to file comprehensive engineering statements to demonstrate that any interference caused to

other facilities meets the *de minimus* standard in the *Sixth Order on Reconsideration*. Such time-consuming and expensive engineering showings can be expected to deter applicants from filing frivolous applications. Furthermore, all applicants for maximized facilities should be required to adhere to the Commission's standard DTV construction timetable (assuming their applications are granted by the Commission in a timely manner). Each applicant for an increase in DTV power also should be required to certify its intention to construct and operate according to the specifications in its application in the event its application is granted.

The Commission also should adopt application processing procedures that will promote the efficient and expeditious resolution of conflicts between mutually exclusive maximization applications. To reduce the burden on the Commission, applicants for mutually exclusive facilities should be given an opportunity to resolve their conflicts privately. Specifically, we propose that such applicants be given a period of 90 days following issuance of the Public Notice of acceptance for filing of mutually exclusive applications for such private resolutions. If the application conflicts are not resolved during this 90-day period through private negotiations, then the Commission should award the grant to the applicant proposing to provide new DTV service to the largest number of households. Information on population and new households proposed to be served by the maximization application would be submitted as part of the engineering portion of the application.

CONCLUSION

In view of the demonstrated inequities and inefficiencies caused by the Commission's new power limitation proposal, Fox respectfully requests prompt action to permit all UHF stations that can do so to maximize their DTV facilities at this time. Anything less would cause arbitrary and capricious results that also would harm the public interest in the prompt rollout of digital facilities.

Respectfully submitted,

FOX BROADCASTING
COMPANY

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DECLARATION

I, R. Evans Wetmore, hereby declare under penalty of perjury that I have reviewed the foregoing Petition for Reconsideration and Emergency Request for Clarification and the facts set forth therein are true and correct to the best of my knowledge and belief.

By R. Evans Wetmore, P.E.
R. Evans Wetmore, P.E.

Title: VP Advanced Engineering
News Technology Group